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No. 80-409

In the Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN C. THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner seeks review of the decision below enforcing internal revenue summonses directing two financial institutions to produce records of petitioner's accounts with those institutions.

The pertinent facts are undisputed and may be summarized as follows: As part of his investigation into petitioner's tax liabilities for the years 1977 and 1978, Special Agent Kevin R. Whalen of the Criminal Investigation Division, Internal Revenue Service, issued the summonses here in question to two banks. In accordance with Section 7609 of the Internal Revenue Code of 1954 (26 U.S.C.), petitioner and his wife gave notice to both banks not to comply with the summonses. When the banks refused to comply pursuant to these

notices, the government petitioned the United States District Court for the District of South Dakota for enforcement of the summonses. In his affidavits filed with the petitions, Agent Whalen stated that he was conducting an investigation for the purpose of determining the correct federal income tax liabilities of Norman C. Thomas for the taxable years 1977 and 1978; that the summoned testimony and documents were not in the government's possession; and that all administrative steps required by the Internal Revenue Code had been followed.

Petitioner intervened in the enforcement proceeding and filed motions to dismiss for lack of jurisdiction and motions for an "Order of Restraint" seeking to restrain the government from proceeding with the enforcement actions. He alleged no facts challenging the government's satisfaction of the prerequisites to enforcement of the summonses. Rather, he challenged the jurisdiction of the district court to order enforcement of the summonses, argued that the summonses were criminal in nature because they were issued under Title 26 of the United States Code, and asserted that the income tax is unconstitutional. The district court ordered the summonses enforced. The court of appeals affirmed (Pet. App. 1-4).

1. Petitioner contends (Pet. 1, 5-6) that the federal courts are without jurisdiction to enforce internal revenue summonses. But the power of the Congress to authorize the Commissioner of Internal Revenue to obtain information by way of administrative process and to confer jurisdiction on the courts to compel compliance with that process is beyond serious question. Article I, Section 8, of the Constitution gives Congress the specific power to lay and collect taxes, and the power to enact

laws necessary to give effect to the taxing power. Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.), which gives the Commissioner power to summon and examine data for the purpose of ascertaining the correctness of any tax return, making a return where none has been filed, or determining correct tax liabilities, is clearly an investigative tool provided by Congress to aid the Commissioner in the discharge of his duty to collect taxes. See *United States* v. *Euge,* 444 U.S. 707 (1980).

Similarly, the power of the district courts to adjudicate summons enforcement actions is well settled. The broad judicial power defined in Article III, Section 2, of the Constitution extends to all cases, in law and equity, arising under the Constitution or the laws of the United States, and to controversies to which the United States is a party. Congress has specifically conferred jurisdiction on the district court, under Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954 (26 U.S.C.), to compel the production of the very type of documents involved in this case. See *Couch* v. *United States,* 409 U.S. 322, 326 (1973); *United States* v. *Gajewski,* 419 F. 2d 1088, 1091 (8th Cir. 1969), cert. denied, 397 U.S. 1040 (1970); *United States* v. *First National Bank of Pikeville,* 274 F. Supp. 283 (E.D. Ky. 1967), aff'd *sub nom., Justice* v. *United States*, 390 U.S. 199 (1968).

Furthermore, the constitutionality of the summons enforcement statutes, as well as the judicial power to enforce summonses, has repeatedly been upheld by this Court. See *Couch* v. *United States, supra; Donaldson* v. *United States,* 400 U.S. 517 (1971); *United States* v. *Powell,* 379 U.S. 48 (1964); *Reisman* v. *Caplin*, 375 U.S. 440 (1964).

2. Petitioner also argues (Pet. 4-6) that an income tax on compensation earned from personal services is a direct tax subject to the apportionment requirements of Article I, Section 9, of the United States Constitution, and that because the apportionment requirements of that Article have not been met, the income tax is unconstitutional. There is no basis for his contention. The Sixteenth Amendment specifically eliminated the requirement of apportionment of direct taxes on income. It is therefore clear that Congress has the power to tax income from compensation for labor. *Brushaber* v. *Union Pacific R.R.*, 240 U.S. 1, 17-19 (1916).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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